

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

JOSE MORALES

Claimant

VS.

DOLD FOODS, INC.

Respondent

Self-Insured

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Docket No. 175,362

AWARD

On the 19th day of October, 1995, the application of the respondent for review by the Workers Compensation Appeals Board of an Award entered by Administrative Law Judge John D. Clark on June 19, 1995, came regularly on for oral argument.

APPEARANCES

Claimant appeared by and through his attorney, Thomas C. Clarkson of Wichita, Kansas. Respondent, a qualified self-insured, appeared by and through its attorney Douglas D. Johnson of Wichita, Kansas. There were no other appearances.

RECORD

The record as specifically set forth in the Award by the Administrative Law Judge is hereby adopted by the Appeals Board.

STIPULATIONS

The stipulations as specifically set forth in the Award of the Administrative Law Judge are herein adopted by the Appeals Board.

ISSUES

- (1) What is the nature and extent of claimant's injury and/or disability?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, and in addition the stipulations of the parties, the Appeals Board makes the following findings of fact and conclusions of law:

Claimant suffered accidental injury to his low back on December 8, 1992, while employed by respondent. After a short period of conservative treatment, claimant underwent low back surgery with Dr. Bernard T. Poole on February 25, 1993. Claimant was returned to light duty by Dr. Poole on June 7, 1993, with limitations of no lifting of over thirty (30) pounds, which limitations were accommodated by respondent. When claimant was examined by Dr. Poole on September 10, 1993, Dr. Poole modified claimant's restrictions to no lifting over seventy-five (75) pounds. Again, claimant's work was accommodated by respondent. Between September 1993 and December 2, 1993, claimant returned to his regular employment and was performing his job duties, with only minor complaints. When Dr. Poole examined claimant on December 2, 1993, claimant's only complaint was that his back would feel tired when he sat for a long time, twisting was painful and he would get occasional hot sensations in his back. Claimant continued working within the restrictions placed upon him by Dr. Poole.

On February 1, 1994, Dr. Poole examined claimant for the last time. Claimant continued to allege intermittent hot feelings in his back and advised he would become sore and tired if he did any heavy lifting. At that time, Dr. Poole removed all restrictions from claimant, finding the fusion was sound and assessing claimant a ten percent (10%) whole body functional impairment. The only restrictions placed upon claimant were the same as those given by Dr. Poole to any person having had back surgery, that being, to protect his back as much as possible for the rest of his life.

Claimant encountered several personnel difficulties during February and March 1994, resulting in his termination by respondent on March 25, 1994. The record reflects the difficulties experienced between claimant and respondent were not related to his back injury, but were instead related to matters of attendance and sanitation policy violations by claimant. As a result of claimant's termination on March 25, 1994, claimant alleges entitlement to a work disability under K.S.A. 1992 Supp. 44-510e.

Claimant cites Lee v. Boeing Military Airplanes, 21 Kan. App. 2d 365, 899 P.2d 516 (1995), as controlling in this matter. In Lee the claimant, after suffering a work-related injury, returned to work with the respondent in the work pool. He worked at an accommodated position until he was laid off as a result of a general work layoff. The Court of Appeals in Lee, found that the presumption of K.S.A. 1992 Supp. 44-510e was overcome even though claimant had returned to work for comparable wages as of the date of the layoff. Lee, for the first time in Kansas, addressed the issue as to whether this presumption could be applied as to one period of time and subsequently overcome as to another period. In allowing this dual application of the presumption found in K.S.A. 1992 Supp. 44-510e, the Court of Appeals rationalized that the presumption of no work disability was designed to help prevent a worker from "double dipping", i.e. earning substantial post-injury wages while collecting work disability benefits. The Court of Appeals, in Foulk v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), rev. denied 257 Kan. 1091 (1995), cited the premise that a claimant would not be able to quit voluntarily from a position in order to avoid the presumption. In this way the Court could assure that a claimant would not be able to create his or her own work disability.

Respondent, in support of the contention claimant should not be awarded work disability in this matter, cites Perez v. IBP, Inc., 16 Kan. App. 2d 277, 826 P.2d 520 (1991). Perez dealt with a packing house worker who sustained injuries when he fell, later to be returned to work with accommodation. The Court of Appeals rejected the claimant's request for work disability, finding that claimant had returned to work after the accident, only to ultimately lose his job as a result of poor attendance. The Court, in noting it was the claimant's burden to persuade the trier of facts by a preponderance of the credible evidence that the claimant's position on this issue is more probably true than not true, found claimant had failed to prove entitlement to work disability, given the facts of the case.

In comparing the factual situations of Lee v. Boeing and Perez v. IBP, Inc., to the present situation, the Appeals Board finds Perez v. IBP, Inc. to be more on point. In this instance, claimant was returned to work at his regular employment for several months prior to his termination on March 25, 1994. Claimant's termination was not related to the injury suffered by claimant but was, instead, related to several violations of the employer's attendance and sanitation policies.

The Appeals Board finds in this case claimant obtained an excellent surgical result, was released to his normal job activities without specific restrictions, only to be subsequently terminated for reasons unrelated to his work injury.

The Appeals Board finds claimant has failed to rebut the statutory presumption against work disability found in K.S.A. 1992 Supp. 44-510e. Claimant would, nevertheless, be entitled to his functional impairment.

K.S.A. 1992 Supp. 44-510e(a) states in part:

“Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence.”

Dr. Poole, in assessing claimant's functional limitations, found claimant had suffered a ten percent (10%) permanent partial impairment of function to the body as a whole. Dr. Blaty found claimant to have suffered a twenty percent (20%) permanent partial impairment of function to the body as a whole as a result of the injury suffered with respondent. Dr. Ernest Schlachter, an independent medical examiner appointed by the Court, found claimant to have suffered a fifteen percent (15%) permanent partial impairment of function to the body as a whole as a result of the injury suffered with respondent. The Appeals Board, in comparing the medical opinions of the three (3) health care experts, finds claimant has suffered a fifteen percent (15%) permanent partial impairment of function to the body as a whole as a result of the injury suffered with respondent on December 8, 1992.

The Administrative Law Judge found claimant's average weekly wage to be \$416.23. As this issue was neither raised nor argued by the parties, that finding is deemed appropriate and the Appeals Board adopts same as its own.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge John D. Clark dated June 19, 1995, shall be, and is hereby, modified as follows:

AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Jose Morales, and against the respondent, Dold Foods, self-insured, for an accidental injury which occurred December 8, 1992 and based upon an average weekly wage of \$416.23, for 28.6 weeks of temporary total disability compensation at the rate of \$277.50 per week or \$7,936.50, followed by 386.40 weeks of permanent partial disability compensation at the rate of \$41.63 per week of \$16,085.83 for a 15% whole body functional disability, making a total award of \$24,022.33.

As of October 20, 1995, claimant would be entitled to 28.6 weeks temporary total disability compensation at the rate of \$277.50 per week in the amount of \$7,936.50, followed by 120.83 weeks permanent partial general disability at the rate of \$41.63, totalling \$5,030.15, totalling \$12,966.65 to be paid in one lump sum less any amounts previously paid. Thereafter, claimant would be entitled to the remaining balance in the amount of \$41.63 per week for 265.57 weeks totalling \$11,055.68, until fully paid or until further order of the Director.

All additional findings of the Administrative Law Judge in his Award of June 19, 1995 are affirmed so long as they are not inconsistent with the findings herein.

The fees necessary to defray the expense of the administration of the Workers Compensation Act are hereby assessed against the respondent to be paid as follows:

Barber & Associates	
Transcript of Regular Hearing	\$163.90
Deposition of Lawrence R. Blaty, M.D.	\$156.00
Deposition of Jerry D. Hardin	\$199.20
Deposition of Bernard T. Poole, M.D.	\$102.00
 Alexander Reporting Co.	
Deposition of Duke Vair	\$120.41
Deposition of Norbert Pacacha	\$ 67.94

IT IS SO ORDERED.

Dated this ____ day of November 1995.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

- c: Thomas C. Clarkson, Wichita, Kansas
Douglas D. Johnson, Wichita, Kansas
John D. Clark, Administrative Law Judge
Philip S. Harness, Director